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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1954.

No. 420

Martin L. Dowell, D. F. Gerstenberger, Mable Gerstenberger, C. R. Roberts, Bernice Roberts, H. M. Lundquist, J. W. Klein, Mrs. J. W. Klein, Emil Lermy, Marguerite M. Miller, *Petitioners,*

vs.

The City of Tulsa, a municipal corporation, C. M. Warren, Mayor, Glenver McConnell, J. L. Jones and W. W. Jenkins, commissioners thereof, *Respondents.*

REPLY BRIEF.

Respondents take the position that the ordinance under attack was enacted under a grant of police power to the City of Tulsa, and that "such power is as broad as the police power of the State" (brief, p. 2). To sustain this the quoted part of Art. XVIII, Sec. 3 (a) of the State Constitution, is relied on. The argument ignores the specific limitation that the provisions of the charter the City is authorized to adopt must be consistent with and subject to the constitution and laws of the state. Under the constitution all legislative power is vested solely in the legislature of the state. The police power is the creature of legislative

action so far as its exercise is warranted by an inferior political agency. Only by virtue of express grant thereof by the state may the City of Tulsa assume to exercise such power as is essential to support the action here complained of. While under a grant of power, the city may exercise such incidental authority as may be essential to the proper administration of the particular grant, it may not extend such authority to other fields under the guise of incidental or implied power. It follows all subordinate governmental agencies are without authority to create police powers in themselves. Only where they are attributes of express grants may they be exercised as incidental thereto. As such grants are subject solely within the legislative field and as the power of legislation is one which, under its constitution, the state may not delegate to any other agency, it follows that respondent is powerless to draw unto itself "power as broad as the police power of the State itself." Nor could the legislature confer such power without itself transcending constitutional limitations. The rule is well stated in *Grundling* v. *Chicago*, 176 Ill. 340, 52 N. E. 48, 48 L. R. A. 230, in defining implied power:

> "An implied power of a municipal corporation is a power necessarily incident to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise."

This rule is approved in *State, ex rel. Adams*, v. *Burge, ex rel. School Board of Beloit*, 70 N. W. 347. There is no such thing as implied police power. Where the term "implied" is loosely used it is in the sense of "incidental" to some power expressly granted. The mere fact a municipal corporation is organized as a governmental subdivision does not, because it could not, of itself, either create an independent power nor enlarge one delegated by the legislature

or a particular purpose. In *Welsh Farmers* v. *Bergeman*, N. J.) 84 Atl. (2d) 631, the court, in speaking of a subordinate agency, said:

> "So also it must be realized that the State Department of Health is likewise a creature of the Legislature, from which its powers are inherited. The Department has no *inherent* jurisdiction to make laws or exercise the full power of the State Government. Such agencies are confined within the limits that a construction of the grants of power will assign to them and those recognizable delegated powers must be employed in a reasonable manner."

This was followed by the statement:

> "We think it axiomatic that an exertion of the police power, affecting personal rights, is, aside from other reasons, nugatory unless made in good faith for the attainment of a public object *within its cognizance.*"

From the authorities noticed it is clear a municipality an only exercise such power as is essential or incidental o subjects "within its cognizance." To be within its cogniance the end to be accomplished must be in furtherance f an established legislative policy. (*Potts* v. *Breen*, 67 Ill. 7, 39 L. R. A. 162.)

> "Regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently *defined by statute*, and when found to be within the framework of such policy." (*Panama Refining Co.* v. *Ryan, et al.*, 293 U. S. 388, 79 L. ed. 446.)

It is beyond the reach of a municipality to by ordinance, ule or regulation initiate or declare the legislative policy f the state. The reason for the delegation of limited powrs to subordinate agencies is because they have no inherent egislative authority.

Section 3 of Article 18 of the Oklahoma Constitution, quoted by respondents, demands that the charters of municipalities shall be consistent with and subject to the constitution of the state. Under the title "Municipal Corporation," 19 R. C. L., Sec. 108, notice is taken of the Oklahoma rule, and the text reads:

> "A municipality is a creature of the state, exercising *delegated* powers only and cannot under our constitution, arrogate to itself governmental powers in conflict with general laws and fixed policies of government."

The term "arrogate" has pointed application to the action of respondents in asserting the right to exercise police power as broad as that of the state itself.

Public policy and legislative policy are alike so far as the matter of the source of their creation goes, as in each case the constitution and laws enacted pursuant thereto are the decisive factors. (*Alderman* v. *Alderman*, 173 S. C. 9, 181 S. E. 897, 105 A. L. R. 102.)

> "By 'public policy' is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect to any question, the only matters which can be considered are its constitution and statutes, and the provisions of the common law as evidenced by the decisions of the courts, for the common law, as modified by the constitution and the laws of the state, is the law of the state."

> "The public policy of a state must be determined by its constitution, laws and judicial decisions and not by the varying opinion of laymen, lawyers or judges as to the demands or interests of the people." (*Hartford Fire Ins. Co.* v. *C. M. & St. P. R. Co.*, 70 Fed. 201, 30 L. R. A. 193.)

This Court in the case of *Thomas* v. *Collins*, 323 U. S. 516, 89 L. ed. 430, where speaking of personal freedoms, said:

> "That priority gives these liberties a sanctity and sanction not permitting dubious intrusions, and it is the character of the right, and not the limitation, which determines what standard governs the choice."

In each of the state statutes offered by respondent to support the broad power claimed by it, is found the common limitation, that the provisions of its charter must be "consistent with and subject to the provisions of the constitution," or shall not be "inconsistent with the constitution or law of the State of Oklahoma." Repetition of this limitation in each in the several statutes having application here, evidences the importance the legislature has attached as well as the caution exercised by it in conferring authority upon municipalities.

Cases Cited by Respondents Distinguished.

Respondents rely upon the case of *District of Columbia* v. *Thompson Company*, (U. S.) 97 L. ed. 888, to support their contention that the police power of the City of Tulsa is as broad as the police power of the state. An examination of this decision quickly reveals that it is of no help whatsoever to respondents' contention. This was a case involving racial discrimination and the real issue concerned the extent of power Congress might confer upon the District of Columbia. The court first determined that the District of Columbia held governmental status like that exercised by states or territories, and that it was within the province of Congress to invest the District of Columbia with like powers. This status, of course, carried with it power of legislation and authority to declare the legisla-

tive policy to like extent as in the case of states or territories. But as a precedent supporting like claims by municipalities brought into being by the state, the case has no application.

In the case of *DeAryan* v. *Butler*, 260 P. (2d) 98, quoting from the opinion (p. 101) we meet the confident assumption "the legislature has delegated to the State Board of Public Health the duty and powers necessary to control and regulate the purity, potability and wholesomeness of public waters in this state." It would appear that the court believed this, of itself, must be decisive of the power of the Board of Health to make use of the public waters to administer medicinal aid, and carried with it the uncontrolled authority to determine the kind of treatment, and compel its adoption, though no legislative grant of such power had been made. That this is the case is a fact established by the decision (p. 102). It affirmatively appears that the legislature granted authority for the issuance of permits to market fluoridated water. Subsequently there was submitted to the legislature a bill to permit the city to fluoridate the city water supply to accomplish the end here attempted by respondents. This legislation the legislature refused to adopt and yet the court held such action afforded no evidence of a refusal by the law making body to declare a policy to enter upon the treatment of infant tooth preservation. Just what kind of evidence the court would have required to establish to its satisfaction upon legislative opposition to the establishment of any such policy rests in hazy speculation. The court in effect held that despite contrary action by the law making authority, clothed with sole jurisdiction to declare the policy of the state, the Board of Health might usurp it, if its action involved nothing more than issuing a permit to the city to supply water containing

fluorine so long as the same was not rendered unfit for human consumption. This action was not consistent with the holding of the court that

> "The Legislature is possessed of the *entire* police power of the state, except as its power is limited by the provisions of the constitution and other laws applicable thereto."

This is a correct statement of the settled law. It follows with the certainty of mathematical demonstration, that where the "entire" police power is lodged in the legislature, only by affirmative action on its part can it be delegated to a Board of Health or the governing body of a municipality, and where on application made for such delegation of the police power to carry out a particular purpose the legislature declines to grant it, the subsequent attempt by the Board of Health to usurp the authority is an unlawful invasion of the legislative field. The court also said:

> "Such police power is an indispensable prerogative of sovereignty and may not be legally limited even though at times its operation may seem harsh, so long as it is not unreasonable and arbitrarily invoked and applied."

This pronouncement is also well grounded but it concerns only the legislative prerogative. For the same reason this power may not be limited, except as noticed, neither may it be disregarded, extended or modified in its operation by an inferior and subordinate agency of state government which owes its existence to the sovereign will.

In this case the court appears to either have missed the real question it was called upon to decide or erroneously decided it on the assumption the action taken was justified because the legislature had not affirmatively prohibited it. Of course this is not the rule. To justify its acts,

an inferior governmental subdivision must be able to point to action of the law making authority of the state, delegating to it the authority essential to give such act validity. This is the exact reverse of the apparent position taken by the court in the cited case.

At page 6 of their brief, respondents refer to the "paramount issue" involved here, as its right "under the legislative power delegated to it by the State of Oklahoma" to "enact" the ordinance involved in this litigation. Petitioners concede this is a correct statement of the issue, and are at a loss to account for the effort to inject the religious phase into the discussion when petitioners had taken no notice of it.

Attention should be directed to one erroneous factor contained in respondents' statement of the issue, *i. e.*, "* * * required the use of fluorine in water to protect the teeth of children and the public generally from dental caries." The case was submitted in the trial court upon a stipulated set of facts and one fact contained in the stipulation was that the effect of fluorine upon the adult members of the population (roughly 85%) had not been determined so the introduction of fluorine into the city water was not to protect the public generally from dental caries but to protect children under the age of twelve years. The effect of the ordinance enacted by the City of Tulsa is to make the adult population a guinea pig without their consent.

Evidence Afforded by Statutes of Public Policy with Respect to the Treatment or Control of Non-contagious Diseases.

Petitioners, complying with the rules of the Court, set out in their petition all of the statutes of the State believed to have even a remote relation to the declared public policy

of the State or the extent of any grant of police power to the City of Tulsa the limitation of the exercise of which is controlled by such policy.

Referring to the contention of petitioners that the state had never established "a policy of attempting to control any disease except those that were contagious, infectious or dangerous" and to the rejection of such contention by the Supreme Court of the state, respondents' position is that such rejection was grounded on the conclusion that as "the Oklahoma legislature had not restricted its health measures to those designed to prevent the spread of infectious, contagious or dangerous diseases" a municipality might invade such field because not expressly forbidden to do so. (Page 5 of response.) Indeed such seems to have been the position of the Oklahoma Supreme Court, for in the course of its opinion, after noticing different statutes, it said:

> "In view of the broad terms in which our Legislature has spoken on the subject, we cannot believe that it was intended to restrict its enactment of measures designed to promote the public health and welfare to those designed to prevent the spread of infectious, contagious or dangerous diseases. We think the mere reading of the statutes herein cited and others enacted by our Legislature is sufficient to show that it has not so restricted its policy, and that it has chosen to make many minimum requirements with reference to food, lodging and a myraid of subjects connected with the public health and/or welfare that have no direct connection with or relation to infectious, contagious or dangerous diseases." (Pet. for Writ, p. 14.)

The fallacy of this reasoning is that it assumes the statutes noticed, unless "restricted" would permit the exercise of other powers not granted, even though such powers

were exercised with respect to contagious or infectious diseases, even though no diseases of that nature were even inferentially related to the subject matter of a single one of the statutes referred to. Why should or how could the legislature restrict something it had not brought into being. It is not possible to either restrict or enlarge that which is non-existent. It may be conceded the legislature dealt in "broad terms" with the subjects of the laws enacted by it, but unless such laws concerned contagious or infectious diseases, there was no occasion for restricting their operation, and the fact unnecessary restrictions were not annexed affords no warrant for an arbitrary extension of their scope to take in subjects the legislature did not have in mind or sought fit to exclude. We agree that

> "The mere reading of the statutes herein cited and others enacted by our legislature is sufficient to show that it has not restricted its policy,"

but as such statutes do not declare or even suggest a policy to deal with any but non-contagious diseases there was no occasion for restriction and a failure to do so did not enlarge it. The assumption that "such a thing (meaning fluoridation) is not against public policy as declared by the Legislature" has no foundation. Indeed the record refutes it. Unless a policy is first established any action, the validity of which depends upon the existence of it, is against public policy.

Why, it may be asked, did the legislature deem it necessary to legislate (Appendix C of Petition) specifically with respect to "contagious, infectious or malarial diseases if, as contended by respondents and announced by the Supreme Court, the statutes enacted with reference to non-contagious diseases, unless "restricted," were sufficient to cover the whole field? And why, after legislating generally

with respect to this class of diseases did the legislature consider it necessary to enact special legislation for the control of venereal disease?

None of the several statutes noticed in Appendix B are even suggestive of a policy to establish a compulsory method of treatment or control of any non-infectious disease. None indicate any purpose to invest a municipality with police power of kind essential to support the action here complained of. To urge as justification for an arbitrary assumption of power that its exercise is not expressly restricted, without being able to point to any legislation expressly conferring the power in the first instance is nothing less than the assertion of a claim having no basis at all.

The simple answer to all this is that the sole legislative authority is not called upon to affirmatively point out to inferior administrative agents the impropriety of attempting to exercise powers it has never delegated to them.

Until respondents can point to some evidence to support it, the assertion (page 11 of brief) that

> "If the State has decided that the incidence of dental caries is serious enough to warrant action on its part, it is hardly for the courts to enjoin such action on the ground caries is a less serious disease than smallpox,"

indulges the assumption the state has decided caries is serious enough to warrant its attention, when the fact is the legislature has never in all the legislation enacted by it, even mentioned caries. A more correct statement than that advanced by respondents would be, that until the state had declared the fact and established a policy with respect thereto, a municipality attempting to deal with the matter is entering forbidden territory.

Some states have taken cognizance of fluoridation and

in such jurisdictions the acts of municipalities upon which police power has been conferred may follow a different rule than obtains in states like Oklahoma where there is a complete lack of legislative expression.

Where a municipality independently of any grant by the state, attempts to justify the exercise of police powers, it violates constitutional rights guaranteed by both state and federal constitutions and where the action is challenged, a federal question is raised.

Respectfully submitted,

E. O. Patterson,
2704 East 13th Place,
Tulsa, Oklahoma,

James B. Coppedge,
815 Ritz Building,
Tulsa, Oklahoma,

Attorneys for Petitioners.